

Democracy and the mass media

A collection of essays

edited by
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Introduction

JUDITH LICHTENBERG

It is hardly more than a platitude to say that the press has always played an important role in the political process. This role is, after all, a primary reason freedom of the press has been thought a necessary safeguard in a democratic society. But never before has the press been as critical to the political process as it is today, and never before has its importance been so widely and publicly recognized. Each election year renders these truths more self-evident.

The increased importance of the press in the political process brings out an ambiguity in its role. Traditionally, the press has been conceived as an observer – ideally, a neutral observer – of the political scene. On this view, the press is part of the political process but it is also not part; it stands outside. But events of the last few decades have demonstrated the inadequacy of this view. The press today – the mass media in particular – is one of the primary actors on the political scene, capable of making or breaking political careers and issues.

The seeming undeniability of the idea that the media are agents in the political process and not simply observers of it provides one important reason for rethinking the traditional prerogatives and responsibilities of the press. Is regulation of the press justified? In the American system, at least, the First Amendment grants the press a privileged place: “Congress shall make no law abridging the freedom of speech, . . . or of the press.” The only question this unqualified statement seems to leave open is what counts as “press.” But this is a

big question. From their inception early in the century, the electronic media have never enjoyed the privileges, the immunity from government regulation, of the print press. Are television reporters not “press”? It may have been easy in the early years to fail to recognize the potential reportorial role of the electronic media. Broadcasters, it has been said, were the “lineal descendants of operators of music halls and peep shows.”¹ That may partly explain why from the beginning government regulation of broadcasting was not seen as trampling freedom of the press. Today, of course, when most people rely heavily on television for news, no one doubts that the electronic media are a mainstream part of the press. But that leaves us with a dilemma about the proper objects of media regulation.

PRINT VERSUS ELECTRONIC MEDIA?

Radio and television stations are licensed by the Federal Communications Commission (FCC). They are subject to a variety of regulations, including equal time rules and, until recently, the fairness doctrine. Abandoned by the Reagan administration’s FCC, but possibly to be enacted by Congress as law in the future, the fairness doctrine required that radio and television stations devote a reasonable amount of broadcast time to controversial issues of importance to the public, and that they offer adequate opportunity for opposing viewpoints.² The equal time rules, which were enacted by Congress in Section 315(a) of the Communications Act, require that all equally qualified candidates for public offices be afforded equal opportunities for broadcast time. (This rule contains four significant exemptions, however.)³ Any suggestion that such rules also fall on newspapers or magazines is taken – by the vast majority of journalists, among others – to be fundamentally inconsistent with the First Amendment and more generally with a commitment to freedom of the press.

The constitutional asymmetry between print and broadcasting is codified in two pivotal Supreme Court decisions: *Red Lion Broadcasting v. FCC* (1969)⁴ and *Miami Herald v.*

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Tornillo (1974).⁵ *Red Lion* concerned a Pennsylvania radio station that in 1964 aired a broadcast by the Reverend Billy James Hargis as part of a “Christian Crusade” series. Hargis attacked Fred Cook, the author of a book called *Goldwater – Extremist on the Right*. He charged, among other things, that Cook had worked for a Communist-affiliated publication (*The Nation*, as it turned out), and that he had now written “a book to smear and destroy Barry Goldwater.”⁶ Cook demanded free reply time, which the station refused to give him. The Supreme Court unanimously upheld the FCC’s requirements that under the fairness doctrine radio and television stations provide free reply time to those attacked in station broadcasts.

Several years later, the *Miami Herald* published editorials criticizing Pat Tornillo, a candidate for the Florida House of Representatives. Tornillo demanded that the paper print his replies, which it refused to do. He brought suit, relying on a Florida right-of-reply statute that provided that if a candidate for nomination or election is attacked “regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper’s charges.”⁷ The statute also required that the reply appear as conspicuously as the charges prompting it. The Supreme Court held that such statutes violate the First Amendment guarantee of a free press. Its decision was once again unanimous, and it failed even to mention *Red Lion*.

Are there significant differences between print and broadcasting that explain and legitimize this deeply entrenched split? (We speak of broadcasting because for most of the history of electronic media, the electronic press was the broadcast press – radio and television. The development and penetration of cable and other communications technologies in the last decade or so have altered the landscape once more and complicated the policy questions confronting us.) If not – if the similarities between print and electronic media are more relevant than their differences – is the current sys-

tem irrational and wrong? Even if it is, that alone doesn't tell us which way to go: whether we should regulate the print media or deregulate the electronic.

"Our views on broadcasting technology were formed," R. H. Coase has said, "in the shadows cast by a mysterious technology."⁸ The earliest rationale for the regulation of electronic media – specifically radio – was the "etheric bedlam," as the Department of the Navy quaintly described it in 1910, resulting from the unregulated operation of several stations on the same frequency at the same time.⁹ Government was called upon to act as traffic cop. Yet it could have performed this function without engaging in the much more extensive regulation it undertook from the beginning. Instead of granting licenses free on the basis of criteria imposed and interpreted by the government – such as that licensees serve as public trustees – the state could have created a market in the spectrum, granting licenses to the highest bidder. Advocates of the free market endorse such a system today.

The most common rationale given for government's performing a regulatory role has always been scarcity. The spectrum is a finite and very limited resource. Perhaps because the inherent limit of the airwaves is so obvious, it was natural to think of the spectrum as belonging to the public, on whose behalf the government could presume to regulate.

But further reflection as well as developments over the last half century call this assumption into question. In the first place, as economists are quick to note, *all* resources are scarce; in this the airwaves are no exception.¹⁰ (The only thing that's not scarce is scarcity itself.) Newspapers are scarce too – although for somewhat different reasons than spectrum space. The number of newspapers that can survive in a given area is extremely small, and the price of owning one is prohibitive for all but very few. Here the cause of scarcity is not the physical limits of the spectrum but certain economic facts, especially the economics of newspaper advertising, which cause not simply scarcity but often monopoly.

How does this happen? To put it briefly, advertisers constitute the economic lifeblood of a newspaper, and the largest

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among them – such as supermarkets and department stores – may spend vast amounts of money on newspaper advertising. The newspaper with the largest circulation in a given market can charge the lowest price per household to advertisers. The lower price per household attracts more advertisers, thus benefiting the newspaper with larger circulation, which, in just another instance of the “rich get richer” syndrome, may therefore come to dominate even more strongly. The result is often that the paper with smaller circulation eventually goes out of business.¹¹

But although the reasons for newspaper scarcity are purely economic, while broadcasting scarcity results from physical facts as well (we may assume) as economic ones, the result is the same: a small number of media outlets within a given market.

These abstract truths have been made concrete in the last few decades by two trends: on the one hand, the rapidly declining number of major newspapers and, more significantly, the more areas served by only one major newspaper; on the other hand, the development of new electronic communications technology, especially cable television, which vastly increases the number of channels available to viewers. These facts demonstrate that if scarcity is the only rationale for regulation, we ought to regulate both print and electronic media, or neither.¹²

It might nevertheless be argued that print outlets are still much more abundant than electronic ones. A cable operator might allocate a couple of channels to public access; that is not many, and one must still rely on other people and organizations to get one’s message out. Yet almost anyone can crank out a pamphlet or a newsletter without dependence on others. Whether this seems a convincing argument for treating print and electronic media differently depends on how important we think the distinction between mass and nonmass media is. That one can produce a leaflet and distribute it – even relatively broadly – in a community may seem a trivial exercise when compared with the product of a large, sophisticated metropolitan newspaper or television station. Publishing a

pamphlet may fulfill the need for self-expression, but it does little to advance the quest for truth or the strengthening of democracy.

But other arguments besides scarcity have been advanced for regulating the electronic media while leaving print untouched. One is that television has a power to shape beliefs and opinions that is not possessed by the printed word: One (moving) picture is worth ten thousand words. Television's effects can be visceral and direct, and it has been held responsible for increased violence, the collapse (or, alternatively, the entrenchment) of traditional sex roles, the end of the Vietnam War, and other significant events and trends. Establishing a causal connection between television viewing and specific behavior, or the formation of particular attitudes or beliefs, is extremely difficult, however, and the evidence for such effects is conflicting. Even if we assume that some such effects exist, there have been, as far as we know, no studies comparing the impact of television with, say, that of newspapers.

There is another important reason to doubt the power argument. Television – particularly in its news and public affairs programming, which is the primary focus of this volume – is likely to exert its power most strongly on the less well-educated and influential in American society, at least partly because such groups are the most frequent viewers of network news.¹³ (The audience for the *MacNeil/Lehrer NewsHour* and other public television programs is richer and better educated.) Yet newspapers like the *New York Times* and the *Washington Post* may have much more influence on the political process because they are avidly read by politicians, public officials, corporate executives, and other decision makers and agents of change in the society.

So the argument from power is inconclusive, for television exerts most power on the least powerful. A related argument is that even if the electronic media are not more powerful than print, they are more intrusive and less escapable. Reading takes effort and active participation, but television's messages thrust themselves upon us. Television's capacity to

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bring messages into the home uninvited surely bears on the appropriateness of regulation in the interest of children, and perhaps more broadly on questions of obscenity and offensiveness. As for regulation in the interest of fairness, liberty, and the political process – the questions to which most of the writers in this volume are primarily addressing themselves – its relevance as an argument independent of the question of television's power is unclear.

Some scholars have acknowledged the parity between print and broadcasting but still maintain that they ought to be treated differently. In an influential 1976 article, Lee Bollinger argued that the Supreme Court "should now acknowledge that for first amendment purposes broadcasting is not fundamentally different from the print media. Such an admission would not compel the Court either to permit access regulation throughout the press or to disallow it entirely. There is . . . an alternative solution."¹⁴ The alternative solution, according to Bollinger, rests on recognizing two facts. One is that society "obviously has *thought differently* about broadcasting than it has about the print media."¹⁵ The other is that "broadcast regulation involves only a *part* of the press."¹⁶ Regulation of broadcasting (or, more generally, of the electronic media) allows us to have the best of both worlds: Since there is good reason to regulate and good reason not to, we can split the difference by regulating some media (the newer ones, where regulation accords with tradition and social attitudes toward it are accepted) while leaving the print press – and our well-formed attitudes about freedom of the press and the First Amendment – untouched.

This argument is satisfying because it lets us have our cake and eat it too. The main objection to it – one that broadcasters can hardly be blamed for raising – is that if no relevant differences between print and broadcasting can be offered, imposing a burden on broadcasting that is not shouldered equally by the print media constitutes invidious discrimination. Unless we can answer this objection, Bollinger's otherwise attractive solution remains problematic.

THE POWER OF THE PRESS

Whatever the similarities and differences between print and electronic media, the desire to impose constraints of one sort or another on the media clearly derives from a general belief in their power to condition people's beliefs, attitudes, opinions, values, worldview. If we did not believe the press was a potent force in the world, we would not think curbing its freedom worth the price. (At the same time, ironically, if we did not believe the press was potent, we would not think protecting its freedom worth the price.)

Yet the precise nature and extent of the media's influence have been matters of dispute for as long as the field of mass communications research has existed – around sixty to seventy-five years.¹⁷ The dominant view has swung widely from the belief that the media heavily-handedly shape human attitudes, to great skepticism about their effects, and back again to a belief in their power. In the 1910s and 1920s, the prevailing belief was that the media have powerful effects on the human mind. This view exemplified a more general picture of society as *mass* society, divided between a large populace and a small elite that was able to manipulate it. The appeal of this view was rooted partly in external events: the impressive rise of the mass press, radio, and moving pictures, on the one hand, and the ways mass political movements, especially fascist movements, used these new tools as powerful instruments of propaganda, on the other.¹⁸

The early belief that the media are powerful was based less on scholarly research than on anecdotal observation and common sense. In the 1930s, social scientists began to study mass communications in a more systematic way. And so began the era of the “minimal effects” thesis: the view that by themselves the media were virtually powerless to change minds, that it was rather the context of family, friends, colleagues, and co-workers that was primarily responsible for people's opinions and attitudes.

Perhaps this conclusion was due in part to the difficulties of

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establishing interesting conclusions about such large and seemingly vague issues with the tools of social science, which, when they do not merely confirm common sense, often seem to confound it. Perhaps it was due also to the absence of deep social conflict, and the existence of a kind of consensus (if only skin deep) during the main period of this phase of research – the 1940s and 1950s. In any case, the intuitively powerful view that the media *do* shape consciousness began to make itself felt again in the 1960s. Several explanations for its resurgence can be offered. One is the upheavals of the 1960s themselves. The presence of striking political events allows the media to exert more effectively any power they have. A related development is increased political skepticism and alienation (what we might call the Vietnam–Watergate syndrome) and the concomitant erosion of political loyalties. Obviously the power of the media increases relatively as other forces lose strength. Finally, there is the rise of television. Television, of course, dates from the late 1940s. But early television newscasts barely realized the visual component of their medium; they much more resembled radio broadcasts, just as the first moving pictures emulated theater. It took some time before television’s possibilities were fully realized and exploited.

In any case, during the third and current period, the predominant view is that the mass media exert great power: not simply economic or political power but the power to shape how we think about the world. Predictably, perhaps, the current view does not simply rehash the first wave of belief in media effects. The original view held that the media influence attitudes: what we like or dislike, favor or reject. The contemporary version is more complex. First of all, it tends to emphasize cognition rather than affect. The media provide not only information but also the conceptual frameworks within which information and opinions are ordered – not just facts, but a worldview. Contemporary mass communications researchers also emphasize the “agenda setting” function of the press. As Bernard Cohen puts it, the press “may not be successful much of the time in telling people what to think, but it is stunningly successful in telling its readers

what to think *about*.”¹⁹ Finally, political actors are forced to shape their messages and their images to the contours of the contemporary press, and this affects the public’s perceptions and the political process.²⁰

To many people these conclusions hardly warrant the strenuous efforts social scientists have employed to establish them: They are just the plain offerings of common sense and, increasingly, the conventional wisdom of politicians and even journalists. The question, one might say, is not whether the press exerts a great deal of power – not always in beneficial ways – but what, if anything, to do about it.

In his essay in this volume, however, Jeffrey Abramson does question the conventional wisdom. In considering four criticisms of press ethics – all bearing, in one way or another, on the press’s power – he takes on the view not only that the press is powerful but also that it is weak and manipulated. Yet even this view, which seems to deny the hegemony of the press, in a sense ironically acknowledges it: If the press does the government’s bidding – if it could *succeed* in doing the government’s bidding – then to that extent the press is powerful. The controversy between those who say the media are powerful and those who say they are weak and manipulated can then be seen as a dispute mainly about the source and content of the media’s messages; the power of the media themselves is not so much in dispute.

This is not to say that the difference is trivial. But even if government’s agenda does not drive the media’s messages, it does not follow that the press is independent of outside pressures. In fact, the criticism Abramson takes most seriously is that what most severely compromises contemporary journalism is the economic pressures on it.

However we resolve questions about the precise nature and source of the press’s power, the larger issue, which Michael Gurevitch and Jay Blumler’s essay explores, is how to resolve the tensions “between the ostensibly democratic ideals which the mass media are supposed to serve and the communication structures and practices that actually tend to prevail.”

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REGULATION AND ITS ALTERNATIVES

That a diversity of perspectives or a multiplicity of voices in the public forum is desirable is perhaps beyond dispute. And that in contemporary society the mass media constitute the public forum may be equally uncontroversial. But how to achieve the multiplicity of voices if it doesn't come about naturally? – that is the question. The problem can be framed in terms of the legitimate constraints on press behavior, and this question is perhaps the guiding theme of the essays in this volume. Henry Geller provides a context by describing current government policy – and plausible alternatives – concerning the regulation of mass communications.

One issue, addressed by Frederick Schauer, is to what degree the press should be insulated from popular choices and decision making. How far, constitutionally and morally, does the First Amendment protect the press from the wishes and goals of the electorate? A related question concerns the legitimacy and appropriateness of regulation of the press. The essays by Stephen Holmes, David Kelley and Roger Donway, Judith Lichtenberg, Owen Fiss, Onora O'Neill, Carl Sessions Stepp, and Lee C. Bollinger all address this question directly. Onora O'Neill argues that regulation of communicators is inevitable; for "legal, economic, and social structures and traditions as well as conversational and literary forms and conventions regulate who communicates with whom, and the topics and occasions on which they communicate." On this view, the question is not whether the press shall be regulated but who shall do it and how conscious and explicit a process it will be. Obviously this view conflicts with the common belief that genuine freedom of the press is possible and that it is incompatible with regulation.

In any case, we need to analyze the notion of explicit government regulation more carefully. Understood broadly, all law is regulation, governing the actions of and relations among individuals, groups, and organizations in a society. In this sense, libel law is a form of regulation. But libel law is part of private law, governing disputes between private par-

ties. Even the most zealous advocates of deregulation or freedom of the press do not argue for the total abolition of libel law – or private law more generally. Indeed, they are likely to believe that private law is exactly where conflicts in a society should be resolved. The controversy over regulation is about the limits of public law, which governs the behavior of public agencies.²¹ The question is how much and what kind of power these public agencies – which in turn regulate the behavior of private parties – should have.

With respect to communications media, we can distinguish three abstract modes of regulation in this narrower sense: content regulation, structural regulation, and subsidy. Content regulations – the paradigm case is the fairness doctrine – make specific demands of press institutions to cover certain kinds of issues or to provide access to certain points of view. Structural regulations – like limits on cross-ownership of media – build restrictions into the structure and organization of media ownership and management; they do not meddle explicitly in ideas or “content.” With subsidy, funds are used to promote programming or material that would fail to be provided in the unrestricted marketplace.

But these categories, although standard in the literature of media regulation, are rather artificial: In practice they cannot always be easily separated. Subsidies are always given for a certain purpose; to that extent they are not wholly content-neutral. Access requirements, usually considered a form of structural regulation, presuppose criteria for sorting and choosing among those who seek access, except where access is offered entirely on a first-come, first-served basis. We must know whether a view has been aired before, or how far it diverges from other positions that have been presented. Such decisions cannot avoid judgments about content. On the other hand, the term “content regulation” is also misleading: So-called content regulations like the fairness doctrine do not prescribe that any particular issues or particular viewpoints be represented, only that issues of “public importance” be covered and that a diversity of views be aired.

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Still, the distinction between content regulation and other forms reflects a fundamental intuition, codified in First Amendment law: the idea that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²² An investigation of the meaning of this core idea forms the basis of T. M. Scanlon’s essay.

What are the alternatives to government regulation of the press? The most obvious is no regulation at all. One view is that “nothing is broke” and so no change is called for. Even many journalists today find this position (or at least admitting it openly) a bit too smug. Carl Sessions Stepp endorses what he calls the professional responsibility model of journalism, which involves educating, or reeducating, journalists to make them more responsive to the kinds of criticisms commonly raised against them.

A position less intrusive than government regulation (which, it must be emphasized again, is a broad category that includes a great variety of possible policies) but more intrusive than the professional responsibility model would endorse the use of ethics codes or press councils. The crucial question is, What sanctions would be attached to violations? Is peer disapproval (if indeed that is forthcoming) enough? Would the journalism profession permit anything more? If not, are codes or councils simply empty symbols?²³

POLITICAL THEORY AND FREEDOM OF EXPRESSION

One’s view about the legitimacy and appropriateness of government regulation of the media depends on how one resolves several underlying issues:

1. The legitimacy of state action generally: Under what circumstances may the state interfere with the activities of nongovernmental agents (individuals, groups, corporations)?

2. The nature and importance of the values and interests at stake in freedom of speech and press. What rights, if any, are at stake?
3. The particular risks and disadvantages of government regulation of the press.

Let us consider each of these in turn.

1. Some people oppose regulation of the press on general laissez-faire grounds. Robert Nozick succinctly expresses this libertarian view: "A minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified. . . . Any more extensive state will violate persons' rights not to be forced to do certain things."²⁴ On such a view, freedom of speech or press possesses no special prerogatives, but liberty-in-general should be extensive. As Kelley and Donway argue in their essay, "the primary rationale for insisting that government respect and preserve [freedom of expression is] the basic rationale for government: the protection of freedom in general."

Stephen Holmes, in his contribution to this volume, challenges the view, which he calls the "storybook account," that the European theorists on whose views the American political system was founded were "tenaciously antistatist." He argues that the early liberal theorists were fully convinced that "private power poses as great a threat to liberty as does public power." Owen Fiss puts this point in contemporary perspective by arguing that "the power of an agency, like the FCC, is no greater than that of CBS . . . there is no reason to assume that one kind of power will be more inhibiting or limiting of public debate than the other."

Lee Bollinger provides a different argument for the legitimacy of state involvement. People can express values through the state, he believes, that cannot or will not get expressed through the marketplace. Just as individually, in my role as citizen, I may vote for a recycling bill at the same time as, in my role as consumer, I throw away bottles and cans, collectively we may support a fairness doctrine as a way of institutionalizing values that will be "undervalued by any other method of social decision making."²⁵

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2. Whatever position one takes on the legitimate limits of state activity in general, one's view about the proper role, if any, of government in regulating the press depends on how one understands the values underlying freedom of expression. Probably the standard view is that although the state is justified in regulating many kinds of activities, speech and press have a special place and are protected from government intrusions legitimate or appropriate in other areas. The First Amendment makes it difficult not to grant that, at least in the United States, speech and press are afforded a large degree of insulation from government interference, whatever one thinks about the legitimacy of regulation in general. But there is still a lot of disagreement about just how much protection is or should be afforded. Many, like Carl Stepp, would argue that government should keep its hands entirely off the press.

Traditionally many different arguments have been advanced for freedom of speech and of the press – that it is a means to attaining truth or individual self-realization, a necessary element in a democratic society, a precondition of personal autonomy, a watchdog of government. One important question is whether one of these values is preeminent or whether they are coequal underpinnings for freedom of expression. Owen Fiss takes the line, first set out by Alexander Meiklejohn, that the need for “rich public debate” in a democratic society – enabling citizens to make intelligent decisions about public policy – is the preeminent value in freedom of expression, and trumps other free speech-related interests, such as the interest in personal autonomy. Judith Lichtenberg argues against a monistic view of free speech interests – granting the importance of individual autonomy, as well as the various other arguments for freedom of expression – but argues that nevertheless government regulation is not precluded. Kelley and Donway distinguish (what is not often clearly separated) the watchdog function from the other political functions of freedom of expression, and argue that the watchdog function is historically and philosophically the most important for the press (much more important than the educa-